Supreme Court, U.S.
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No. 98-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN RE: WILLIAM E. WRIGHT, JR.,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER WILLIAM E. WRIGHT, JR.

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SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER, WILLIAM E. WRIGHT, JR.

Petitioner, William E. Wright, Jr. ("Wright"), submits this supplemental brief in support of his petition to bring to the Court's attention an intervening matter not available at the time of the filing of the petition. On March 17, 1999, the day after Wright's petition was docketed, United States District Judge Nauman Scott took the unprecedented step of filing a petition on his own behalf, seeking a reversal of the judgment of the United States Court of Appeals for the Fifth Circuit, which judgment reversed in part and affirmed in part the sanctions Judge Scott imposed on various sanctions defendants, including petitioner, Wright. Judge Scott's petition bears number 98-1498 in this Court.[1]

In his petition, Judge Scott asks this Court to reinstate the judgment of sanctions imposed by him or, alternatively, to remand the entire matter for further proceedings consistent with its guidelines. Wright respectfully submits that Judge Scott, not a party to the proceedings at issue but instead the district judge presiding over them, has no standing to file a petition on his own behalf in this Court. Because this is a case in which the United States is interested, such a petition could only have been filed in this Court by the Solicitor General, and not an appointed special prosecutor. 28 U.S.C. § 518(a); *United States v. Providence Journal Company*, 485 U.S. 690, 108 S. Ct. 1502 (1988); *Federal Election Commission v. NRA Political Victory Fund, et al.*, 513 U.S. 88, 115 S. Ct. 537 (1994). Wright respectfully further submits that whether or not Judge Scott's petition is considered by this Court, the content of that petition shows that should this matter be remanded to the district court for any reason, it must be remanded to a judge other than Judge Scott, who should be recused.

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1. Several other sanctions defendants have also filed petitions in this Court. The other petitions include: (a) petition on behalf of sanctions defendant James W. Berry, No. 98-1468; (b) petition on behalf of sanctions defendant Robert B. Bieck, Jr., No. 98-1469; and (c) petition on behalf of sanctions defendant W. Glenn Burns, No. 98-1470.

A. Judge Scott's Petition Shows Why This Matter, If Remanded For Any Reason To The District Court, Must Not Be Remanded To Judge Scott

In its judgment, the Fifth Circuit Court of Appeals reversed and vacated the imposition of sanctions against petitioner, Wright, and sanctions defendants W. Glenn Burns ("Burns") and Robert B. Bieck, Jr. ("Bieck"), among others. App. 1 at A-49. The Fifth Circuit concluded that Judge Scott was clearly in error in his finding of bad faith conduct by Wright, Burns, and Bieck, because they did not breach any duty to reveal the CNA D&O Policy to the plaintiffs. App. 1 at A-46. With respect to Wright, Burns, and Bieck, the Fifth Circuit concluded the record potentially sufficient to support sanctions, and remanded to the district court for further consideration in the light of its opinion. App. 1 at A-49. The Fifth Circuit had concluded that the conduct of Wright, Burns, and Bieck at a July 11, 1994, settlement meeting might constitute bad faith, warranting the remand. App. 1 at A-46.

The Fifth Circuit's remand is narrow and relates only to the conduct of Wright, Burns, and Bieck during settlement negotiation in a single late night settlement meeting on July 11, 1994, the eve of trial. During that settlement meeting, "[t]he Crowes made an offer of $6.2 million. Burns replied that this figure was far beyond any theory of insurance coverage. No one at the meeting objected to this statement." App. 1 at A-8. The Fifth Circuit frames the question regarding this settlement negotiation meeting as "simply . . . whether the record supports a finding that any of the attorney defendants 'actually lied' with respect to the D&O policy." App. 1 at A-42. The record is wholly insufficient to support such a finding. It is factually undisputed that Wright could not have maintained knowing silence during a perceived misrepresentation by Burns and, accordingly, there is no possible basis for a finding of bad faith conduct on Wright's part.

1. *The Facts Of The July 11 Meeting*

The testimony of plaintiffs' counsel Joseph R. Ward ("Ward") shows that Burns' statement was accurate and was made and received only in the context of attorneys' errors and omissions coverage, not D&O coverage. Ward expressly admitted that he understood Burns' statement in the context of attorneys' errors and omissions coverage. Ward also admitted that Burns' statement was accurate.

Burns' clients were attorneys, not directors. Burns', Bieck's and Wright's clients were being defended under legal malpractice policies, not D&O insurance. It is undisputed that the limits applicable to the legal malpractice policies were far less than plaintiffs' settlement demand of $6.2 million. Ward understood Burns' statement just as it was made — with respect to potential legal malpractice coverage only. In his testimony at the sanctions hearing, Ward admitted:

> Q. In that regard, when you were talking earlier and in your earlier testimony indicated that Mr. Burns had said to you that your $6 million offer, I believe it was, was beyond any theory of coverage or words to that effect —
>
> A. I had initially thought that Mr. Wright made that statement to me, but Mr. Burns has corrected me, that he made that statement. And in his defense, Mr. Burns added that he was referring to the errors and omissions coverage. And I agree with that statement, that $6 million was outside any possible errors and omissions coverage.

R. 5051 (Ward 12/4/95 at p. 68).

During the course of the sanctions proceeding, Ward further amplified on his understanding that the $6.2 million referred only to legal malpractice coverages, stating:

A. So when we got in there and I brought up coverage, Glenn [Burns] apparently — and I thought, it was Bill [Wright] and I apologize for saying it was Bill [Wright] if it wasn't. Glenn [Burns] apparently said, Joe [Ward], your demand is outside all possible coverage. Glenn [Burns] maintains he is now talking about the errors and omissions coverage, which is all I thought. And it was, because I had broken it down $4 million for [defendant] Smith and $2 million for the attorneys. And Glenn [Burns] is saying, well, $6 million, Joe [Ward], we might as well go home. And this was horse trading. And I wouldn't expect them to say we got "X" million dollars, it's on the table. We have to be honest about that. I know there is some horse trading that goes on there. I negotiate as a defense lawyer all the time.

R. 5051 (Ward 12/4/95 p. 207).

Having admitted that Burns' statement related to legal malpractice coverage, Ward went on to admit that Burns made no misrepresentations about legal malpractice coverage:

Q. And during the course of those discussions, as I take it from these proceedings, there is no allegation that he was anything other than forthright with you about what coverages existed and talked to you at length about that?

A. I believe that's a very accurate statement. I don't believe Glenn Burns and I — I don't believe he misled me at all about that. We were very open . . .

R. 5051 (Ward 12/4/95 at p. 209).

The only conclusion which the record permits is that Burns' July 11 statement related only to the potential $5 million legal

malpractice coverage and, as such, was perfectly correct. It is not only Ward, but also Wright, who understood the statement in the correct context, the context of legal malpractice coverage. Wright testified:

> Q. And were there any policies that you understood were being addressed other than Home and New England?
>
> A. No.
>
> Q. Was there any discussion that night with Ward or [co-counsel] McDowell about the directors?
>
> A. No.
>
> Q. Was there any discussion that night about any directors or officers coverage of any kind?
>
> A. No.
>
> Q. Was there ever any question by Mr. Ward or [co-counsel] McDowell in your presence that evening whether there was any coverage arguably or conceivably or possibly available other than Home and New England?
>
> A. Absolutely not.

R. 5090 (2/12/96 Tr. at pp. 66-67).

Ward admitted that Burns' statement related to the attorney-defendants' legal malpractice insurance and that Burns' statement was correct. It is undisputed that Wright, Bieck, and Burns understood the statement in this context. The record is completely insufficient to support any finding — and indeed it negates any finding — against Wright in connection with the July 11 meeting.

Wright's emphasis on the facts of the July 11 meeting is well-founded. After all, the sole issue on remand identified by the Fifth Circuit relates to the facts of that meeting. As it now stands, the Fifth Circuit's judgment would have Judge Scott consider the available evidence and determine whether the conduct of Wright (together with Burns and Bieck) at that July 11 meeting could constitute bad faith. The evidence already shows it could not.

2. *Judge Scott's View Of The July 11 Meeting*

Against this clear factual backdrop, Judge Scott's recitation of the "facts" in his petition stands in sharp contrast and shows that Judge Scott ignores the evidence and has instead already predetermined that Wright (together with Burns and Bieck) acted in bad faith at the July 11 meeting:

> Another attorney, W. Glenn Burns ("Burns") told the plaintiffs that their demand for $6.2 million was beyond all possible theories of insurance coverage — even though the amount of insurance exceeded $7 million, counting the CNA policy. Although the other defense attorneys present at this meeting knew that the statement was incorrect, no one advised the plaintiffs of the truth.

Judge Scott's Petition at 9.

The Fifth Circuit has remanded to Judge Scott to review the facts of the July 11 meeting. The undisputed facts in the record of this case show no remand for such a determination is necessary. However, in the event this Court were to uphold the Fifth Circuit's judgment and remand this matter to the district court for any reason, justice requires that this matter be remanded to a judge who is able to fairly review the available evidence. Judge Scott's petition shows Judge Scott would be unable to do so. Judge Scott has overlooked the undisputed evidence and has instead prejudged that Burns' statement was incorrect, that the other defense attorneys, including petitioner, Wright, knew the statement was

incorrect, and that the other defense attorneys, including petitioner, Wright, failed to advise the plaintiffs of the truth.

CONCLUSION

For the reasons previously stated in the petition of William E. Wright, Jr., this Court should issue its writ, reverse the holding of the Fifth Circuit, and dismiss the sanctions charges pending against petitioner, William E. Wright, Jr. Alternatively, if this case is to be remanded to the district court for any purpose, it must not be remanded to Judge Scott, who should be recused.

Respectfully submitted,

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